In the case at bar, the District Court properly applied the appropriate standard in granting summary judgment to PSE&G. A review of the Court's February 22, 1999 Order reveals that the District Court noted that the "opposing party cannot rest upon mere allegations, but must present actual evidence that creates a genuine issue of material fact." Pet. App. P. B4. Mr. Barth has consistently failed to present any actual evidence in support of petitioner's myriad unsubstantiated complaints. Even at present, a review of the statements contained in petitioner's Brief reveals that they are wholly self-serving, unsupported by the record, and in most instances simply inaccurate or unintelligible.

In dismissing the "pipeline" act claims, the District Court stated:

> [t]hus, plaintiff's compensatory claims against PSE&G are barred under both acts and his claim for injunctive relief is barred under the New Jersey act. Moreover, even if the Court assumes that plaintiff satisfied the procedural prerequisites for filing an action for injunctive relief, . . . plaintiff failed in his opposition to PSE&G's summary judgment motion to set forth any factual evidence that creates a genuine issue of material fact.

Pet. App., pp. B5-B6.

In his Brief, Mr. Barth baldly states that the District Court "inappropriately misapplied the standard for summary judgment" (Pet. Br., p. 12) but he never explains any understandable basis for this allegation. Petitioner also claims the lower court erred in dismissing the "Federal Natural Gas Pipeline Safety Act" claim. Pet. Br., p. 11. Mr. Barth claims,

inaccurately, that the federal district court found that petitioner would be entitled to "injunctive" relief pursuant to such unidentified federal statutes. Pet. 13. Petitioner totally misreads the District Court's opinion. In this regard, the District Court properly surveyed potentially applicable statutes/regulations and observed that "[f]ederal law . . . does not permit a private person to bring an action for damages other than costs and fees" and that New Jersey law "does not permit a private person to bring an action for injunctive or compensatory relief." (Pet. App., p. B5)

Even at this juncture, petitioner continues to fail to show that he has standing to prosecute any of the cited statutes which purportedly govern the "temporary" natural gas line installed by PSE&G. Petitioner simply provides citations of statutes and regulations followed by his interpretation of what the provision requires, however, he fails to quote the actual provision or to argue how the provision applies to the issues at bar. Further, the scant case-law cited to is misplaced and inapplicable to the situation at hand. The courts below did not accept such a "shotgun" approach and instead properly required Mr. Barth to demonstrate specifically which statutes and regulations are being violated and the specific facts in support thereof.

Petitioner's primary opposition to the aspect of PSE&G's summary judgment motion related to such "pipeline" acts is rooted in Mr. Barth's lay opinion that the "temporary gas line" created a "public safety hazard." Pet. Br., p. 12. Contrary to petitioner's spurious allegation, PSE&G has never admitted that this line was installed in any improper fashion. In reality, both the "temporary" and the permanent gas lines were installed properly and safely and petitioner's exaggerated public safety claims are wholly baseless and were properly rejected below.

In Petitioner's Brief, Mr. Barth baldly states that the District Court "incorrectly assumed that since plaintiff had not provided an expert report, plaintiff could not set forth any actual evidence that creates a genuine issue of material facts." Pet. Br., p. 12. However it is clear the petitioner needed to, but did not, offer expert opinion concerning the subject gas installation. It is beyond dispute that the factfinder should not be permitted to speculate on matters which are clearly beyond the ken of the average juror. Mr. Barth's complaint engenders technical concerns of gas, gas piping and installation, safety and the like, and petitioner refused to support his lay conjecture with credible expert evidence. Petitioner's sole reliance upon two photographs of the scene have no foundation in the record; yet petitioner incredibly states that the pictures would allow a jury to "clearly determine PSE&G is liable . . ." Pet. Br., p. 12. Such an unsupported allegation should not be accepted. Since petitioner failed to identify any such "liability" expert, petitioner's Complaint against PSE&G on such grounds was rightfully dismissed. To date, Mr. Barth continues to fail to offer any credible evidence to create a material factual issue related to the safe installation of the gaslines, via expert opinion or otherwise, and accordingly the court's orders below should not be disturbed.

Notwithstanding the need or not for expert testimony nor that no credible proofs were produced by Mr. Barth which establish that any gas line was in any way substandard, the District Court properly found that plaintiff simply lacked standing to bring action under such "pipeline" acts. With regard to the federal "pipeline act" claims, it is clear that this petitioner does not have standing to bring such an action. In *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975), jurisdiction was predicated upon the existence of a Federal question under the Natural Gas Pipeline Safety Act. Plaintiffs

alleged that pursuant to the Act certain federal safety standards were established by the Department of Transportation and that violations thereof caused the explosion at a poultry plant where plaintiffs were employed. Defendant Claxton moved to dismiss the complaint on the ground that the claim did not arise under the laws of the United States. *Id.* at 753-54. The *Doak* court noted that the statute was silent as to civil liability of pipeline companies for injury or damage resulting from alleged violations of safety standards prescribed by the Secretary. After a thorough review of the Act and the five factors which must be present before a private remedy can be implied, the *Doak* court held that this Act did not grant an implied private remedy to the plaintiff.

Petitioner has never even made a showing otherwise that the relied upon statutory provisions would even apply to the subject pipe installation. It is PSE&G's position that the subject gas distribution pipe or main is not the type of "pipeline" contemplated by these acts and therefore such statutes simply would not govern this installation nor this defendant utility company and are inapplicable to the matters at bar. Petitioner has not even attempted to refute this defense.

In sum, petitioner offers no legal or factual support for the "pipeline statute" claims. Further, in the absence of expert testimony which could explain this highly technical area of gas transmission and distribution and whether and how the instant application is somehow defective, the Court is without the necessary opinion testimony needed to support petitioner's claims. The District Court properly recognized this failure in petitioner's case and properly reached the correct conclusion in granting summary judgment to PSE&G.

II.

THE DISTRICT COURT PROPERLY APPLIED THE DOCTRINE OF *RES JUDICATA* TO BAR PETITIONER'S CLAIMS

Once disposing of petitioner's statutory pipeline claims, the District Court next held that "[p]laintiff's remaining claims against PSE&G are barred by the doctrine of claim preclusion, also known as *res judicata*." Pet. App. p. B6. In finding in favor of PSE&G, the District Court stated that:

> [P]laintiff's instant complaint and the New Jersey Superior Court condemnation action involve identical causes of action, parties and issues. Plaintiff does not challenge the validity of Judge Diana's order . . . That judgment was final . . . and entered after a trial on the merits."

Id. In Point V of his Brief, petitioner claims, without explanation, that the District Court's reliance upon the doctrines of *res judicata* to bar the plaintiff's action has somehow been foreclosed by the Supreme Court's holdings in cases "such as *Montana v. United States*, 99 S. Ct. 970, 973 (1979)." To the contrary, *Montana's* holding supports the District Court's decision. The District Court found that the underlying basis for Mr. Barth's instant complaint has already been litigated in the state courts where it was determined that PSE&G was fully entitled to the land pursuant to New Jersey's eminent domain law.

Notwithstanding petitioner's instant sweeping and unsupported allegation that the state court proceedings have been "constitutionally infirm," in reality, petitioner can point

to not a single instance where any of his rights were so impaired. Pet. Br., p. 14. With regard to petitioner's alleged constitutional deprivations, Mr. Barth fails to set forth any facts which show how any aspect of the process has been unconstitutional. It has been held that a landowner is not deprived of due process if there exists an adequate process to secure compensation. *See Stringer v. United States*, 471 F.2d 381, 385 (5th Cir. 1973). As detailed by Judge Diana, PSE&G was duly granted the easement and legally entitled to the property following a full process in which Mr. Barth enjoyed ample due process protection from unlawful taking.

III.

PETITIONER HAS SHOWN NO OTHER BASIS FOR REVERSAL OF THE DISTRICT COURT'S ORDER OF FEBRUARY 22, 1999 OR ITS PREVIOUS ORDERS

Petitioner seeks to reverse the February 22, 1999 District Court order which denied varied relief to petitioner below. For instance, petitioner moved to strike PSE&G's Answer for failure to answer interrogatories, however, Mr. Barth was furnished answers to interrogatories from PSE&G. Accordingly, the District Court properly denied petitioner's request. With regard to the other motions (to extend time for discovery, leave to file amended complaint, and leave to file late notice of claim), the District Court did not abuse its wide discretion, but instead provided ample reasoning by which petitioner's various motions were denied.

In Point V of his Brief, petitioner observes that the District Court, in a footnote, addressed the potential application of the New Jersey Tort Claims Act. Whether or not the Act does apply to this suit is moot since the Court

firmly established that "claim preclusion" would serve to bar petitioner's Complaint. Accordingly, at best, if the court's *dicta* was in error it was harmless and not a separate ground for reversal. With regard to alleged breach of contract claims presented by petitioner, petitioner incorrectly avers that PSE&G "never disputed the existence of a contract" between Barth and PSE&G." Pet. Br., p. 14. In fact, there is no contract and certainly no breach.

CONCLUSION

Petitioner has failed to demonstrate any "compelling reasons" for this Court to exercise its discretionary jurisdiction in this matter. Pet. Br., p. 8. The February 22, 1999 Order and Opinion of the District Court, granting summary judgment to PSE&G and denying petitioner's motion, was a correct application of the standard for summary judgment as well as a proper use of the court's discretion and accordingly, for all of the foregoing reasons, PSE&G respectfully requests the writ should be denied.

Respectfully submitted,

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